Supreme Court of the United States

OCTOBER TERM, 1941.

LEO P. MIRSKY,

Petitioner
(Appellee Below),

—against—

CONLEW, INC.,

Respondent
(Appellant Below).

BRIEF IN SUPPORT OF PETITION.

The Circuit Court of Appeals states that the doctrine laid down in *Stanolind Oil & Gas Co.* v. *Logan*, 92 F. (2) 28 (C. C. A. 5), and *Tuffy* v. *Nichols*, 120 F. (2d) 906 (C. C. A. 2) is applicable to the facts in this case (fol. 88). Moreover, the Court seems to rest the reversal on what appears to be a new doctrine, and one not having any authority in the Bankruptcy Act, to wit, that the burden rests upon a bankrupt, not only to set forth all of his assets in his schedules, but to seek an order of "abandonment" of those assets, when the schedules show them to be worthless. And this is so, apparently, even though the referee in bankruptcy, and the creditors, did not see fit to appoint a trustee against whom alone such an order could be made.

POINT I.

The decision of the Circuit Court of Appeals on the facts in this case, is in conflict with decisions of other Circuit Courts and of this Court on similar facts. Therefore this case is properly subject to a writ of certiorari.

In the two cases cited by the Circuit Court in its opinion, as applicable to the facts here (fol. 88), the Court below seems to have overlooked that in each of these cases there was a trustee. In the *Stanolind Oil & Gas Co.* case, the decision turned on the fact that the trustee had never abandoned his claim to the property although he preferred to do nothing about it. Indeed, the Court said in its opinion:

> "A close question of fact was presented as to whether the lien had been abandoned by the trustee."

It may very well be that a trustee may be willing to mark time and await developments before taking possession of property which is scheduled. But that is not our case. In our case *there was no trustee*, and when the creditors and the referee in bankruptcy were confronted with the alternative of appointing a trustee and taking possession of this contingent claim, or dropping it, they chose to drop it—a clear indication of abandonment.

In the other case referred to by the Circuit Court, to wit, *Tuffy* v. *Nichols, supra*, there also was a trustee, but there the facts turned on the point that the bankrupt *had not listed* an interest in an estate to which he was entitled. We quote from the language of the case itself:

> "Actually she (the bankrupt) had held, but had not listed a remainder interest in the estate of Eli F. Rogers who had died in Branford in 1899."

In that very case, the Circuit Court remarks that the facts do not justify a finding of laches or "*abandonment of the property* as in *Kinder* v. *Scharff*, 231 U. S. 517", a case to which we will refer presently.

So that the Court's decision turns on two cases in which *there were trustees*, and in one of which the bankrupt had committed a fraud upon the Court in not listing the claim.

However, other Circuits, and this Court too, consider the same problem in a different light. Thus, for instance, in the case of *Laursen* v. *O'Brien*, 90 F. (2d) 792 (C. C. A. 7), the Court held:

> "There was evidence that he (the bankrupt) fully disclosed to the court, his attorney, and the creditors, the nature of his contract with Laursen, and they decided not to pursue his cause of action against Laursen.
>
> Where no trustee is appointed and there is no fraud by the bankrupt, an existing cause of action in the debtor, such as here asserted, may be prosecuted by him. *Danciger* v. *Smith*, 276 U. S. 542, 11 A. B. R. (N. S.) 538."

In the Seventh Circuit, therefore, it would seem to be the rule that in a case involving facts such as we have here, to wit, where a bankrupt fully discloses what he has and the creditors choose to do nothing about it, that the bankrupt can proceed with the enforcement of the claim in his own name. This leads us directly to a decision in this court as to the effect of a disclosure by a bankrupt, *and inaction by creditors.* In the case of *Dushane* v. *Beall*, 161 U. S. 516, this Court said:

> "If with knowledge of the facts, or being so constituted as to be chargeable with such knowledge,

> an assignee, by definite declaration, or distinct action, or forbearance to act, indicates, in view of the particular circumstances, his choice not to take certain property, or if, in the language of Ware, *J.*, in *Smith* v. *Gordon,* 6 Law Rep. 313 Fed. Cas. Co. No. 13,052, he with such knowledge 'stands by without asserting his claim for a length of time, and allows third persons in possession of their legal rights to acquire an interest in the property', then he may be held to have waived the assertion of his claim thereto."
>
> *Dushane* v. *Beall,* 161 U. S. 516.

The case of *Kinder* v. *Scharff,* 231 U. S. 517 is commented on by the Circuit Court in the Second Circuit in *Tuffy* v. *Nichols,* 120 Fed. (2d) 906, as being distinguishable from the facts in the *Tuffy* case, because in the *Kinder* v. *Scharff* case, *there was an abandonment of the property.* Let us therefore see what *Kinder* v. *Scharff* holds, because it seems to us that our facts come very close to an indication of *an abandonment of property* with knowledge of its existence.

In *Kinder* v. *Scharff, supra,* the principal point in issue related to the bar of a suit by a trustee after two years had elapsed. The point involved in that case was also one as to whether, irrespective of the bar of two years, a trustee could stand by, knowing of a possible claim, and do nothing about it until it was worth his while to pursue it as against the rights of a bankrupt. This Court said:

> "The question is simply whether, when, after an estate is closed, and more than two years later a trustee comes to the conclusion that he undervalued the claim that he knew of and might have sued upon, or finds that the value has risen, the bankruptcy court may reopen the estate for the sole purpose of getting

rid of the statute, and allowing the trustee to sue. (Citing cases.)"

This Court, through Mr. Justice Holmes, in affirming the judgment of the Supreme Court of Louisiana, said:

> *"Whether it be put on the construction of the Bankruptcy Act or on the ground that the estate was fully administered quo ad hoc, or of laches on the part of the trustee, it comes to the same thing. The claim in controversy cannot be made the ground of a suit."*
>
> *Kinder* v. *Scharff*, 231 U. S. 517.

The opinion of the Referee that "if a bankrupt has made full disclosures, offered his creditors all that he had and procured a rightful discharge more than six years before, then in the interests of finality an estate so closed may stay closed" (fol. 62) seems to be supported by the cases in this court which we have cited, and the case of *Webb* v. *Raleigh Hardware Co.*, 54 Fed. (2d) 1065 (C. C. A. 4), to which we will now refer.

In the *Webb* v. *Raleigh Hardware Co.* case, there was a trustee. The evidence showed that the bankrupt disclosed to the trustee the fact that a certain lien of a secured creditor could be reduced. Yet the trustee did nothing about it. The Court held that the claim, either by way of a right of redemption or a right to sue, reverted to the bankrupt because it was abandoned by the trustee. We quote:

> "The trustee having such knowledge, or being in a position that such knowledge could have been obtained, and having held the estate for almost a year, then making final settlement of it without electing to purge the debt of its usury before the estate was

closed, the *title to the claim for usury revested in the bankrupt.* (Citing cases.)"

In another part of the same opinion, the Court, citing many cases, said:

"Where he (the trustee) elects, after a reasonable time, not to take and charge the estate with incumbered property of the bankrupt, or where he abandons it, the property and the right of redemption remains in or reverts to the bankrupt.

In the absence of fraud or misrepresentation (either by the statements of the bankrupt or by withholding information he should have given) the property reverts to the bankrupt, subject to the valid lien indebtedness, and the *bankrupt has a right to assert his title thereto.* (Citing many cases.)"

Webb v. *Raleigh Hardware Co.*, 54 Fed. (2d) 1065.

The Court's attention is respectfully called to the important point that the property reverted to the bankrupt, and there is no mention made of any requirement that he must "seek a specific order of abandonment", as required in our case.

It seems to us that in view of this conflict of opinion on a question of the rights of a bankrupt to property which he has disclosed, and which the creditors did not seem desirous of taking or administering, is one which should be considered by this Court, in the light of the conflicting views of the Fourth Circuit and the Second Circuit, and particularly in the light of apparent failure to follow the ruling of this Court on similar facts, in the cases referred to above.

As to the Circuit Court's suggestion that there is some burden resting upon the bankrupt to "seek a specific

order of abandonment," the Circuit Court has cited no authority, either in the Statute, or in cases, holding to such a view. We have been unable to find any. We know of none. The bankrupt has performed his whole duty under the Bankruptcy Act when he sets forth in his schedules all of his property and all of his debts. Beyond that, it seems to us he need not go. It is the duty of the trustee, if one is elected, or the creditors, if they do not choose to elect a trustee, to take possession of the property. Their failure to do so has been construed as an abandonment, and thereupon the property reverts to the bankrupt. It does not seem to us necessary to go through the futile gesture of entering an order, when it is perfectly apparent that in substance the same result is being accomplished, to wit, an abandonment by the creditor, and a reversion to the bankrupt of his property so abandoned under Section 110, Title 1, U. S. C. A.

Wherefore, it is submitted that the facts in this case, and because of the conflict of the authorities thereon, this Court would be justified in granting to the petitioner a writ of certiorari to the Circuit Court of Appeals for the Second Circuit to review the order made by it on January 29th, 1942, and for such other relief as petitioner may be entitled to.

HORACE G. MARKS AND
DAVID HAAR,
Attorneys for Petitioner.

DAVID HAAR,
On the Brief.

BRIEF FOR THE RESPONDENTS IN OPPOSITION

No. 102

Office - Supreme Court, U. S.
FILED
JUL 6 1942
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1941.

LEO P. MIRSKY,

Petitioner
(Appellee Below),

—against—

CONLEW, INC.,

Respondent
(Appellant Below).

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

LEONARD G. BISCO,
Attorney for Respondent.

HENRY LANDAU,
On the Brief.

THE COURT PRESS, N. Y. C.

INDEX.

PAGE

Statement of Issues 1, 2

Point I—The decision of the Circuit Court was proper and in accord with decisions of other courts 3

Point II—The decision of the Circuit Court of Appeals is not in conflict with decisions of the other Circuit Courts or this Court..... 6

Point III—Petition for writ of certiorari to review the decision of Circuit Court of Appeals should be denied 8

Table of Cases Cited:

Dushane v. *Beall*, 161 U. S. 516 6

Kinder v. *Scharff*, 231 U. S. 517 6

Laursen v. *O'Brien*, 90 F. (2d) 792 (C. C. A. 7).... 6, 7

Re Lighthall, 221 F. 791 (N. D. N. Y.) 4

Stanolind Oil & Gas Co. v. *Logan*, 92 F. (2d) 28 (C. C. A. 5) 3, 4, 5

Tuffy v. *Nichols*, 120 F. (2d) 906 (C. C. A. 2)..... 3, 4

Webb v. *Raleigh Hardware Co.*, 54 Fed. (2d) 1065 (C. C. A. 4) 6, 7

Other Authority Cited:

Bankruptcy Act:
Section 11d 6

Supreme Court of the United States

OCTOBER TERM, 1941.

LEO P. MIRSKY,

Petitioner
(Appellee Below),

—against—

CONLIW, INC.,

Respondent
(Appellant Below).

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Statement of Issues.

The question posed by this case is whether failure to appoint a trustee in bankruptcy to take possession of a non-burdensome asset, which had a potential but no present value, should be deemed an abandonment of said asset even though the bankrupt's position has not changed and no rights of third parties have intervened, and whether the estate should be reopened to administer said asset, after it became valuable.

Respondent accepts petitioner's statement of issues with the following additions, exceptions and qualifications:

The asset sought to be administered consists of the bankrupt's contingent interest in a trust created under the will of one Henry Ettelson, deceased, which provides that

upon the death of the life beneficiary two-thirds of the balance of the principal not exhausted, plus accrued income, should be paid to the lineal descendants of the bankrupt's mother her surviving. The bankrupt's expectancy could be extinguished either by his death prior to that of his mother or by the exhaustion of the trust according to its provisions (fols. 46-49). Under the laws of the State of New York, the bankrupt's expectancy was property which would have passed to the trustee if there had been one (fol. 55).

In his report Referee Frey states that no proof was submitted to him that the bankrupt's expectancy had any value at the time of his adjudication, and that it is possible that such expectancy acquired all or most of its value since that date. The minutes of the hearing before Referee Frey disclose that at that time the bankrupt's expectancy was not assigned or encumbered and that it was in the same condition as it was at the time of the filing of the petition for adjudication, except for the death of the life beneficiary (fol. 45).

Referee Frey did not make any definite recommendation in his report, stating,—

> "It would seem then that where there has been no Trustee, a court is at liberty to pick whichever one of these diverse holdings it feels is apropos to the particular facts" (fol. 62).

In its opinion, the Circuit Court of Appeals pointed out that the bankrupt has not changed his position to his detriment; that the appointment of a trustee to hold title to an asset of such small value would have involved a needless expenditure, and that since no order of abandonment was entered, mere inaction by creditors should not be regarded as an abandonment of the asset.

POINT I.

The decision of the Circuit Court was proper and in accord with decisions of other courts.

The facts of the case determine whether there has been an abandonment. In the instant case we are dealing with a non-burdensome asset consisting of an expectancy which did not ripen into a present right to receive it until some time after the closing of the estate. There was no affirmative disclaimer, no order of abandonment, no rights of third parties intervened, and there was no change in the bankrupt's position.

The Circuit Court correctly held that, under those circumstances, the doctrine enunciated in *Stanolind Oil & Gas Co.* v. *Logan*, 92 Fed. (2d) 28 (CCA 5th), and *Tuffy* v. *Nichols*, 120 Fed. (2d) 906 (CCA 2nd), is applicable.

The facts in the *Stanolind* case are almost parallel to the facts in the instant case. In that case, the bankrupt owned oil leases which had potential speculative, but no actual, market value. In his final account filed in 1926, the trustee stated that he held the said leases; that he made an effort to sell them but was unable to do so, and that, in his opinion, the said leases were worthless. The estate was closed in November, 1926. In 1930, oil was discovered in a field covered by one of the leases. Shortly thereafter the State court appointed a receiver for the bankrupt corporation who assigned the lease to a third person. In 1931, an order was made reopening the estate and the trustee then appointed brought an action to cancel the assignment made by the State court receiver and to compel the assignee to account. The court held that there was nothing to show abandonment by the trustee unless it be inaction; that, inasmuch as the asset was not onerous,

an abandonment could not be spelled out from such inaction.

In an attempt to distinguish the *Stanolind* case from the instant case, the petitioner points out, at page 8 of his brief, that in the *Stanolind* case, unlike here, a trustee was appointed. This is a distinction without a difference for the report by the trustee that the lease was worthless and unsaleable, followed by inaction on his part, makes out an even stronger case for abandonment.

In *Tuffy* v. *Nichols*, 120 Fed. (2d) 906, the bankrupt, unlike the bankrupt here, failed to list a contingent asset. The court however held at page 909:

> "As property of unquestioned value, and in no contingency burdensome, it could have been abandoned, even if listed, only by some positive indication of intent to do so."

The petitioner's contention that the creditors had the alternative of appointing a trustee and taking possession of the bankrupt's expectancy, or abandoning it, is utterly untenable. As the Circuit Court of Appeals pointed out in its opinion here, the appointment of a trustee to take title to a then valueless asset would have meant needless expense. There was no other asset in the estate and the trustee could not very well have kept the estate open for an indefinite period of time, awaiting the death of the life beneficiary. The trustee was likewise not bound to sell the bankrupt's interest in the estate for a pittance, or to abandon it because he was then unable to sell it.

In *In re Lighthall*, 221 Fed. 791 (N. D. N. Y.), the bankrupt scheduled an interest in an insurance policy on the life of another which was subject to cancellation on certain contingencies and which would lapse upon non-

payment of premiums. The trustee did not sell the asset or make any other disposition thereof. Many years after the closing of the estate, the insured died and the estate was thereupon reopened for the purpose of administering the bankrupt's interest in the proceeds of the policy. There, as in the instant case, the bankrupt made a motion to vacate the order reopening the estate, urging that the inaction of the trustee constituted an abandonment. The court denied the bankrupt's motion, stating, at page 795:

> "There was no declination of or refusal to accept title to the claim and the circumstances evince no purpose of the trustee to abandon it, or of the bankrupt to avert ownership of it. * * * There was nothing the trustee in bankruptcy could have done or could do, except to report to the court and have his accounts settled and await results. He was not bound to sell this claim, then substantially worthless, at the peril of being held to have abandoned it to the bankrupt."

In suggesting in its opinion that if the bankrupt desired to avoid the doctrine of *Stanolind Oil & Gas Co.* v. *Logan* he should have procured a specific order of abandonment the Circuit Court of Appeals did not impose a new duty upon the bankrupt. That Court merely stated that a bankrupt can not base a claim of an abandonment of a non-burdensome asset upon mere inaction and that he should therefore obtain an adjudication of the question during the pendency of the proceeding.

Under the facts of this case, the Circuit Court properly held that there was no abandonment of the bankrupt's expectancy and that the order vacating the order reopening the estate should be reversed.

POINT II.

The decision of the Circuit Court of Appeals is not in conflict with decisions of the other Circuit Courts or this Court.

The petitioner predicates his petition for a writ upon a claim that the decision of the Circuit Court of Appeals is in conflict with the decisions of this court in *Dushane* v. *Beall*, 161 U. S. 516, and *Kinder* v. *Scharff*, 231 U. S. 517, and with the decisions of the Circuit Court of the Seventh Circuit in *Laursen* v. *O'Brien*, 90 Fed. (2d) 792, and the decision of the Circuit Court for the Fourth Circuit in *Webb* v. *Raleigh Hardware Co.*, 54 Fed. (2d) 1065.

The claim of the petitioner is wholly without merit. The decision of the Circuit Court of Appeals here is not *contra* to the doctrine laid down by this court in *Dushane* v. *Beall, supra,* to the effect that a definite declination, distinct inaction or forbearance to act in view of particular circumstances may constitute an abandonment. Forbearance under the circumstances here, is not tantamount to abandonment.

There is no similarity between the facts in *Kinder* v. *Scharff, supra,* and the facts in the instant case. In *Kinder* v. *Scharff*, a trustee, who originally undervalued a claim, attempted to reopen an estate more than two years after it was closed to enforce a cause of action existing at the time of bankruptcy. This court held that in view of the provisions of Section 11d of the Bankruptcy Act, the estate should not be reopened for the sole purpose of getting rid of the two-year statute of limitations, thus allowing the trustee to sue.

Here, the creditors seek to reopen the estate for the purpose of taking possession of an asset which, because of

its contingent nature, had no value prior to the closing of the estate and not to institute an action.

The situation in *Laursen* v. *O'Brien*, 90 Fed. (2d) 792, is totally unlike the situation here. That case did not deal with the reopening of an estate but with a defense interposed by defendant that plaintiff, a bankrupt, was not a proper party to institute an action which existed at the time of the filing of the petition for adjudication. The court merely held that plaintiff-bankrupt was the proper party to prosecute a cause of action which his creditors decided not to prosecute after the existence thereof had been fully disclosed to them by the bankrupt. Here there was no declination or declaration of abandonment.

In *Webb* v. *Raleigh Hardware Co.*, 54 Fed. (2d) 1065, *supra*, after the trustee reported that the bankrupt's property had no value and an order was entered directing its abandonment, he sought to take possession of the asset upon the ground that the bankrupt fraudulently failed to disclose to him that a certain mortgage encumbering his property was tainted with usury. The decision of the court did not turn on whether the trustee's forbearance amounted to abandonment, but upon the question whether the estate should be reopened because of fraud or misrepresentation on the part of the bankrupt. The court there found that there was no fraud; that the trustee had knowledge or sufficient notice concerning the usury prior to the closing of the estate and, consequently, there was no reason why the estate should be reopened.

POINT III.

Petition for writ of certiorari to review the decision of Circuit Court of Appeals should be denied.

There is no real conflict of authority between the Circuit Court of Appeals of the Second Circuit and this Court or other Circuit Courts as to what constitutes an abandonment. The determination here is sustained by authority and it does not require a review by this Court.

Respectfully submitted,

LEONARD G. BISCO,
Attorney for Respondent.

HENRY LANDAU,
On the Brief.